No. 124289

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court
	)	of Illinois, Third District,
Plaintiff-Appellant,	)	No. 3-15-0877
	)	
	)	
v.	)	There on Appeal from the Circuit
	)	Court of the Fourteenth Judicial
	)	Circuit, Rock Island County,
	)	Illinois, No. 15 CF 290
	)	
JONATHAN LINDSEY,	)	The Honorable
	)	F. Michael Meersman,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

As part of a narcotics investigation, police brought a trained drug-detection dog into a common area of a motel, and the dog alerted at the door to defendant's motel room. Based on the dog's alert and other information, officers obtained and executed a search warrant for the room, where they discovered heroin. Defendant was charged with unlawfully possessing heroin with intent to deliver within 1000 feet of a school. The circuit court denied defendant's motion to suppress, which argued that the dog sniff was an unlawful search under the property-based analysis set forth in *Florida v. Jardines*, 569 U.S. 1 (2013). The People appeal from the appellate court's judgment finding instead that the dog sniff was an unlawful search because it violated defendant's reasonable expectation of privacy.

No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether a motel guest has no reasonable expectation of privacy in motel common areas accessible to the public.

2. Whether motel common areas accessible to the public are not properly considered the "curtilage" of a motel room.

3. Whether the exclusionary rule should not apply when police officers conform their conduct to this Court's precedents.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a), 317, 604(a)(2), and 612(b)(2). On January 31, 2019, this Court allowed the People's petition for leave to appeal.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

Officers used a trained drug dog in a motel common area and, after obtaining a search warrant, seized heroin from defendant's room.

Rock Island Police learned from a confidential informant that defendant was selling narcotics out of the American Motor Inn in Rock Island. C16.[1] After a background check revealed defendant's past involvement in multiple crimes involving controlled substances, *id.*, an undercover officer contacted defendant, who agreed to sell narcotics but then refused to complete the sale, C17. After the aborted sale, the officers watched defendant walk to the Motor Inn but did not see which room he entered. *Id.*

[1] "C_" and "R_" refer to the common law record and report of proceedings, respectively.

On April 27, 2015, Rock Island Police Officer Tim Muehler was conducting surveillance at the Motor Inn and observed defendant drive out of the parking lot. *Id.* Defendant's driver's license had been suspended, and a patrolman was dispatched to conduct a traffic stop of defendant. *Id.* Defendant was arrested for driving with a suspended license and transported to the Rock Island Police Department. *Id.*

Officer Muehler interviewed defendant, who said that he was staying in room #129 at the Motor Inn; a fellow officer learned from motel staff that defendant was registered to room #130. *Id.*

Rock Island County Sheriff's Deputy Jason Pena brought his trained drug dog, Rio, to conduct a free air sniff outside of room #130. *Id.*; R29. Some rooms in the motel were accessible from the outside sidewalk, while others, like rooms #130 and 131, faced each other in a small hallway inside an external door. The hallway was open to the public as the door was propped open; no key was necessary to reach the common area. C17; R29, 34. Deputy Pena directed Rio to search the general area for narcotics, and Rio alerted at the door handle and seal. C17; R9, 34. After being informed of the alert, defendant admitted to Officer Muehler that he was staying in room #130. C17.

A judge authorized a search warrant, and officers executed it and found heroin and paraphernalia, including a scale and baggies, in room #130.

C20; R29. Defendant later admitted that he was selling heroin, claiming that he did so to pay for his brother's funeral. R7.

The circuit court denied defendant's motion to suppress.

Defendant, who was charged with unlawfully possessing heroin with intent to deliver within 1000 feet of a school, C6, moved to suppress the seized evidence, arguing that the dog sniff was an unreasonable search conducted from the curtilage of his motel room, in violation of *Florida v. Jardines*, 569 U.S. 1 (2013). C32-34. Defendant conceded that cases addressing the diminished expectation of privacy in motel common areas "would be controlling in a sense," and that they would justify a finding that no Fourth Amendment search occurred, but he argued that he was proceeding under the property-based approach of *Jardines*. R51.

The circuit court denied the motion to suppress, explaining that while a dog sniff in an apartment building common area would have been an unreasonable search under the Fourth District's then-recent decision in *People v. Burns*, 2015 IL App (4th) 140006, case law clearly provided that motels were to be treated differently. R59-64.

Following a bench trial — at which it was stipulated that heroin was discovered in defendant's motel room, defendant subsequently confessed to possessing heroin, and the motel was 631 feet from a junior high school — the circuit court found defendant guilty and sentenced him to seven years in prison and three years of mandatory supervised release. C57-59; R87, 95-96.

The appellate court reversed, holding that the dog sniff violated defendant's reasonable expectation of privacy.

Relying on the approach set forth by Justice Kagan in her concurring opinion in *Jardines*, the appellate court reversed. Switching gears, defendant argued, and the majority agreed, that the dog sniff was an unlawful search in violation of his Fourth Amendment rights under the privacy-based approach, because defendant had a reasonable expectation of privacy in his motel room that was violated when police used "a sophisticated sensing device not available to the general public" – the trained drug-detection dog – outside of that room. A5-7, A10-11.

The majority further declined to apply the good-faith exception to the exclusionary rule. A12-16. Although it acknowledged this Court's precedent holding that a hotel occupant's reasonable expectation of privacy was "reduced with regard to the common area adjoining the room," A13, the majority held that a reasonably well-trained officer would have known, based on, inter alia, Justice Kagan's concurrence in *Jardines* and the United States Supreme Court's decision in *Kyllo v. United States*, 533 U.S. 27 (2001), that the sniff violated defendant's reasonable expectation of privacy. A8-9. Justice Schmidt dissented, asserting that the good-faith exception applied because "the relevant authority indicates that canine sniffs in the common corridors of hotels are not fourth amendment searches." A18.

STANDARD OF REVIEW

This Court reverses a trial court's findings of fact when ruling on a motion to suppress only if they are against the manifest weight of the evidence. *People v. Burns*, 2016 IL 118973, ¶ 15. This Court reviews de novo the trial court's legal ruling on whether to suppress evidence. *Id.* ¶ 16.

ARGUMENT

A Fourth Amendment search occurs in two circumstances: (1) when government agents engage in unlicensed physical intrusion on a constitutionally protected area possessed by the defendant to obtain information, and (2) when government action violates a person's reasonable expectation of privacy. *Florida v. Jardines*, 569 U.S. 1, 5-6 (2013).

Here, Deputy Pena and his trained drug dog Rio were in a motel common area that was open to the general public, in which, under this Court's precedents, defendant had a reduced expectation of privacy. And the United States Supreme Court and this Court have repeatedly affirmed that a sniff by a drug detection dog does not constitute a search at all, and thus does not violate an individual's reasonable expectation of privacy. Under these circumstances, it is inappropriate to suppress the reliable, trustworthy evidence of defendant's heroin dealing.

I. Defendant Had No Reasonable Expectation of Privacy in the Motel Common Area, and the Use of the Trained Drug-Detection Dog Does Not Change This Result.

To establish a Fourth Amendment violation, defendant bore the "burden of establishing that [he] had a legitimate expectation of privacy" in the motel hallway. *People v. Johnson*, 237 Ill. 2d 81, 90 (2010). In determining whether an individual has a reasonable expectation of privacy, this Court considers (1) whether the person has an ownership or possessory interest in the property; (2) whether the person has exercised prior use of the property; (3) whether the person has the ability to control or exclude others' use of the property; and (4) the person's subjective expectation of privacy. *Id.*

Here, defendant established no legitimate expectation of privacy in the motel hallway. As a motel guest, he had no ownership of the common hallway outside his motel room door. He had exercised no private use of, nor did he have any ability to exclude others from, the hallway. And defendant demonstrated no subjective expectation of privacy in the hallway. To the contrary, before the dog sniff, he exhibited no subjective expectation of privacy even in the room itself, claiming to police that he was staying in a different room, #129, which was not accessed from the hallway. C17.

To conclude that the dog sniff here violated defendant's reasonable expectations of privacy would be inconsistent with this Court's discussion of motel common areas in *People v. Eichelberger*, 91 Ill. 2d 359 (1982). *Eichelberger* explained that while "a defendant does have a legitimate

expectation of privacy within his hotel room," "in contrast to the occupant of a private dwelling who has the exclusive enjoyment of the land he possesses immediately surrounding his home, the hotel occupant's reasonable expectations of privacy are reduced with regard to the area immediately adjoining his room." *Id.* at 366; *see also Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) (discussing "the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home"); *United States v. Dockery*, 738 F. App'x 762, 764 (3d Cir. 2018) ("Appellant had no reasonable expectation of privacy in this common area of the motel, which was open to guests and the public alike[.]") (citing *United States v. Acosta*, 965 F.2d 1248, 1252 (3d Cir. 1992)).

In short, it is well settled that defendant had no reasonable expectation of privacy in the hallway outside his motel room such that the police activity in the hallway implicated his Fourth Amendment rights. The use of the trained drug-detection dog does not counsel in favor of a different result. The United States Supreme Court has held that dog sniffs are not Fourth Amendment searches. *See Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005) ("the use of a well-trained narcotics dog . . . generally does not implicate legitimate privacy interests" because, unlike a "thermal imaging device" that will detect "perfectly lawful activity," a well-trained narcotics dog "reveals no information other than the location of a substance that no

individual has any right to possess"); *see also infra* Section III.C. And this Court has never departed from that established precedent outside the context of private residences. *See infra* Section III.C; *cf. People v. Bonilla*, 2018 IL 122484, ¶ 42, *cert. pending*, No. 18-1219. This is consistent with other cases holding that not all uses of sense-enhancing devices constitute Fourth Amendment searches. *See Florida v. Riley*, 488 U.S. 445, 448-52 (1989) (officer's observation of greenhouse from helicopter was not search); *United States v. Dunn*, 480 U.S. 294, 303-04 (1987) (officers' act of shining flashlight into defendant's barn from nearby field was not search); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (no search when officers flew airplane over defendant's property); *United States v. Lee*, 274 U.S. 559, 563 (1927) (no search when agents used searchlight to observe cases of liquor on deck before boarding boat).

This Court should not depart from these established precedents. *See People v. Clemons*, 2012 IL 107821, ¶ 9 ("any departure from *stare decisis* demands special justification" and "prior decisions will not be overruled absent 'good cause' or "compelling reasons") (internal quotation marks omitted); *People v. Manning*, 241 Ill. 2d 319, 332 (2011) ("*Stare decisis* enables both the people and the bar of this state to rely upon this court's decisions with assurance that they will not be lightly overruled.") (internal quotation marks and brackets omitted). Applying both applicable case law

and relevant general principles, defendant established no legitimate expectation of privacy in the motel hallway.

II. *Jardines* Does Not Apply Because the Motel Hallway Was Not Defendant's Home.

Despite having relied on it in the circuit court, in the appellate court defendant properly disclaimed any argument that the dog sniff in the motel hallway was a search under the property-based test applied by the United States Supreme Court in *Jardines*. Nor did the appellate court embrace such an argument. Nevertheless, in the interest of completeness, it is addressed here.

"The Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Jardines*, 569 U.S. at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984)). For private residences, this protection extends to the "curtilage," an area "'intimately linked to the home, both physically and psychologically,'" "where 'privacy expectations are most heightened.'" *Id.* at 7 (quoting *Ciraolo*, 476 U.S. at 213). "The protection afforded the curtilage is essentially a protection of families and personal privacy," *Ciraolo*, 476 U.S. at 212-13, as the curtilage is "considered part of home itself for Fourth Amendment purposes," *Oliver*, 466 U.S. at 180; *see also People v. Janis*, 139 Ill. 2d 300, 310 (1990) ("The term 'curtilage' refers to the area immediately surrounding a dwelling house which is so intimately associated with the home and the

privacies of life that it is given the same protection under the fourth amendment as is afforded to the home itself.").

But this Court has concluded that "the curtilage concept does not apply to the open areas immediately adjacent to or surrounding a commercial establishment." *Janis*, 139 Ill. 2d at 313; *see also Elkins*, 300 F.3d at 653 ("Moreover, it is clear that areas that adjoin a commercial building but are accessible to the public do not receive curtilage-like protection. Indeed, even inside a building, the Fourth Amendment is not violated when police walk into parts of a business that are knowingly exposed to the public."). And "[u]nder Illinois law, a hotel guest is a business invitee of the hotel." *Esser v. McIntyre*, 267 Ill. App. 3d 611, 617 (1st Dist. 1996), *aff'd* 169 Ill.2d 292 (1996). Thus, consistent with precedents of this Court and the United States Supreme Court, the motel common area was not curtilage. There is therefore no basis to find that a dog sniff occurring in that area implicated defendant's Fourth Amendment rights.

True, this Court recently adopted the minority position that dog sniffs in the common areas of multi-unit residences are Fourth Amendment searches because the dog sniff takes place in the residents' curtilage. *See Bonilla*, 2018 IL 122484; *People v. Burns*, 2016 IL 118973.[2] But courts have

[2] *Compare State v. Edstrom*, 916 N.W.2d 512, 518-19 (Minn. 2018), *cert. denied* Feb. 25, 2019, No. 18-6715 (dog sniff in apartment building common hallway not within unit's curtilage); *State v. Williams*, 862 N.W.2d 831, 838 (N.D. 2015) (dog sniff in hallway outside condominium unit was not search under *Jardines*); *State v. Nguyen*, 841 N.W.2d 676, 682 (N.D. 2013) (same for

uniformly declined to find that common areas in hotels and motels are curtilage and therefore that a dog sniff occurring in such an area is a Fourth Amendment search. *See United States v. Legall,* 585 F. App'x 4, 5-6 (4th Cir. 2014) (dog sniff at threshold of hotel room door not unlawful search under *Jardines*); *United States v. Lewis*, No. 15 CR 10, 2017 WL 2928199, at *7–8 (N.D. Ind. July 10, 2017) (dog sniff in external hotel walkway was not within room's curtilage); *State v. Foncette*, 356 P.3d 328, 331 (Az. Ct. App. 2015) (no *Jardines* search when sniff performed in hotel hallway because hallway not constitutionally protected area); *Sanders v. Commonwealth,* 772 S.E.2d 15, 23 (Va. Ct. App. 2015) (walkway outside motel room not curtilage and dog sniff not search under *Jardines*).

These courts are correct in their unanimous determinations. *Jardines* articulated a "straightforward" principle: a Fourth Amendment search occurred because officers exceeded an implied license and gathered information "in an area *belonging to Jardines* and immediately surrounding

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apartment building hallway); *United States v. Makell*, 721 F. App'x 307, 308 (4th Cir. 2018) (per curiam), *cert. denied*, No. 18-5509 (Dec. 10, 2018) (same for "common hallway of the apartment building, including the area in front of [defendant's] door"); *State v. Luhm*, 880 N.W.2d 606, 618 (Minn. Ct. App. 2016) (same for hallway outside defendant's condominium); *Lindsey v. State*, 127 A.3d 627, 642-43 (Md. Ct. Spec. App. 2015) (same for hallway outside apartment door); *Seay v. United States*, No. 14-0614, 2018 WL 1583555, at *4–5 (D. Md. Apr. 2, 2018), *appeal dismissed*, 739 F. App'x 193 (4th Cir. 2018) (same); *United States v. Bain*, 155 F. Supp. 3d 107, 118-19 (D. Mass. 2015), *aff'd*, 874 F.3d 1 (1st Cir. 2017) (same); *United States v. Penaloza-Romero*, No. 13 CR 36, 2013 WL 5472283, at *7 (D. Minn. Sept. 30, 2013) (same); *United States v. Mathews*, No. 13 CR 79, 2013 WL 5781566, at *3 (D. Minn. Oct. 25, 2013), *aff'd*, 784 F.3d 1232 (8th Cir. 2015) (same).

his house." 569 U.S. at 5-6 (emphasis added). Thus, the property-based test does not apply to an area in which a defendant has no possessory interest. And whatever possessory interest an apartment resident might be said to have in a nearby common area, a motel common area does not belong to a guest in any meaningful way. *See Esser*, 267 Ill. App. 3d at 617 (hotel guest is "business invitee"). For example, a motel guest does not have the same rights as an apartment tenant: a motel need not resort to eviction proceedings if a guest refuses to leave at check-out time; a person with a reservation who arrives at a fully-occupied motel cannot institute an action against motel occupants for recovery of possession of a room. Similarly, unlike an apartment tenant, a motel guest has no right to exclude others from a common area. Because, as a motel guest, defendant had no possessory interest in the motel hallway, *Jardines* does not apply. *See also Patel v. City of Montclair*, 798 F.3d 895, 898-99 (9th Cir. 2015) (officers' entry into publicly accessible portion of motel not search under *Jardines*, as commercial property was not one of Fourth Amendment's enumerated areas); *United States v. Lewis*, 1:15-CR-10-TLS, 2017 WL 2928199, at *8 (N.D. Ind. July 10, 2017) (no *Jardines* search because as "a guest who registered with the hotel that morning, the Defendant did not obtain either a property interest in any of the areas outside the rented room or a right to exclude others from those areas or to protect it from observation").

For similar reasons, the officers did not exceed any implied license. The hallway was unlocked, and, in addition to other motel guests and staff, members of the public could freely walk into it. Nor is it customary for motel guests to limit or even be aware of who may enter unlocked common areas of the motel. In short, because the conduct occurred in an unlocked motel common area readily accessible to the public and shared with motel staff and other guests, *Jardines* does not apply.

III. Application of the Exclusionary Rule Is Inappropriate Because The Officers Followed This Court's Precedents.

In criminal trials, courts exclude evidence obtained in violation of the Fourth Amendment when police officers act culpably. *Davis v. United States*, 564 U.S. 229, 236 (2011). Under the good-faith exception, the exclusionary rule does not apply when officers conform their actions with precedent permitting their conduct. *People v. LeFlore*, 2015 IL 116799, ¶ 23. Here, binding appellate opinions advised the officers that motel room occupants have reduced expectations of privacy in motel common areas and that dog sniffs are not Fourth Amendment searches. Because the officers thus did not act culpably by conducting the dog sniff from the unlocked motel common area, the exclusionary rule does not apply.

A. Excluding evidence is a last resort, inapplicable when officers act in good faith.

The exclusionary rule is a "prudential doctrine" that judges created to deter culpable Fourth Amendment violations. *Davis*, 564 U.S. at 236

(internal quotation marks omitted). "Exclusion exacts a heavy toll on both the judicial system and society at large, because it almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" — its "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *LeFlore*, 2015 IL 116799, ¶ 23. Thus, "for exclusion of the evidence to apply, the deterrent benefit of suppression must outweigh the substantial social costs." *Id.* at ¶¶ 22-23 (internal quotation marks omitted). The "Supreme Court has repeatedly stated that 'exclusion has always been our last resort, not our first impulse.'" *Id.* at ¶ 22 (quoting *Herring v. United States*, 555 U.S. 135, 140 (2009)) (additional internal quotation marks omitted).

The "deterrence rationale loses much of its force and exclusion cannot pay its way" when "police acted with an objectively reasonable good-faith belief that their conduct was lawful." *LeFlore*, 2015 IL 116799, ¶ 24 (internal quotation marks omitted and brackets omitted); *see also Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014) (exclusionary rule does not apply when officer makes reasonable mistake of law). In "determining whether the good-faith exception applies, a court must ask the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *LeFlore*, 2015 IL 116799, ¶ 25 (internal quotation marks omitted). Where, as here, binding

appellate precedent held that the activity was not a search or in a constitutionally protected area, the answer to that question is "no."

B. This Court has instructed that motel common areas do not enjoy the same expectation of privacy as homes.

This Court's precedent is clear: motel guests have reduced expectations of privacy in areas outside of their rooms compared to those outside private residences. *Eichelberger*, 91 Ill. 2d at 366; *see also supra* p. 7. *Eichelberger* cited with approval *United States v. Burns*, 624 F.2d 95 (10th Cir. 1980), which found no Fourth Amendment violation when an officer eavesdropped on a motel room from a hallway. The Tenth Circuit explained that because of "the public, or semipublic, nature of walkways adjoining such rooms, reasonable expectations of privacy are correspondingly lessened." *Id.* at 100.

Eichelberger also cited *United States v. Agapito*, 620 F.2d 324 (2d Cir. 1980), in which the Second Circuit found no Fourth Amendment violation when officers pressed their ears to a crack between the door and the doorframe to eavesdrop on an adjoining hotel room. The court explained that "the reasonable expectations of privacy in a hotel room differ from those in a residence." *Id.* at 331. A "transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants," so that while "a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home." *Id.* (internal quotations omitted).

Thus, "the extent of the privacy [a motel guest] is entitled to reasonably expect may very well diminish," *id.*, when compared to the privacy reasonably expected in one's home.

C. Under the precedents of the United States Supreme Court and this Court, dog sniffs were not Fourth Amendment searches.

The United States Supreme Court has long held that a dog sniff is not a Fourth Amendment search or otherwise constitutionally relevant. *See Caballes*, 543 U.S. at 409; *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (no Fourth Amendment search when officers conducted dog sniff of automobile at highway checkpoint because sniff "is not designed to disclose any information other than the presence or absence of narcotics"); *United States v. Place*, 462 U.S. 696, 707 (1983) (dog sniff of luggage at an airport "did not constitute a 'search' within the meaning of the Fourth Amendment" because it was "so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure"). This Court's decisions are in accord. *See*, *e.g.*, *People v. Bartelt*, 241 Ill. 2d 217, 226-27 (2011) ("it is undisputed that the officers had the authority to conduct an exterior dog sniff of defendant's truck during the traffic stop and that the dog sniff itself was not a search subject to the fourth amendment"); *People v. Bew*, 228 Ill. 2d 122, 130 (2008) ("a dog sniff is *sui generis*, as it discloses only the presence or absence of contraband.").

Recently, however, the Court for the first time suggested a departure from its previously settled view that dog sniffs are not Fourth Amendment searches. *See Bonilla*, 2018 IL 122484, ¶ 42 ("a drug-detection dog is much different from overhearing a private conversation"). But this Court's decision in *Bonilla* does not impact the good-faith analysis here, because (a) *Bonilla* was decided subsequent to the April 2015 events here, and (b) unlike past dog sniff precedents, it involved a private home, *see id.* ¶ 40, and this Court has instructed that areas outside motel rooms are unlike those outside private residences. *See supra* Sections I.B, III.B.

D. Courts have sanctioned dog sniffs from motel common areas.

Courts faced with similar factual scenarios have declined to exclude the evidence obtained. In *United States v. Roby*, 122 F.3d 1120, 1124 (8th Cir. 1997), the Eighth Circuit considered "whether a canine sniff in the common corridor of a hotel intrudes upon a legitimate expectation of privacy," and concluded that it did not. Although Roby "had an expectation of privacy in his . . . hotel room, . . . because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far." *Id.* at 1125; *see also id.* ("Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip."). "As a result," the Eighth Circuit "h[e]ld that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment." *Id.*; *see also Legall,* 585 F. App'x at 5-6 (dog sniff at threshold of hotel room door not unlawful search under

Jardines); *Lewis*, 2017 WL 2928199, at *7-8 (dog sniff in external hotel walkway was not within room's curtilage); *Foncette*, 356 P.3d at 331 (no *Jardines* search when sniff performed in hotel hallway because hallway not constitutionally protected area); *Sanders v. Commonwealth,* 772 S.E.2d at 23 (walkway outside motel room not curtilage and dog sniff not search under *Jardines*)).

Given this "legal landscape," the officers here would have had "no reason to suspect that [their] conduct was wrongful under the circumstances." *LeFlore*, 2015 IL 116799, ¶ 51; *see also Blankenship v. State*, 5 N.E.3d 779, 784-85 (Ind. Ct. App. 2014) (good-faith exception applied to dog sniff in hotel hallway despite prior case requiring warrant for sniff of front door of residence). Thus, the exclusionary rule should not apply.

E. The appellate majority wrongly faulted officers for failing to follow the *Jardines* concurrence and cases not involving motel common areas.

The appellate court held that the officers should have known that the search invaded defendant's reasonable expectation of privacy based on the reasoning underlying *Kyllo v. United States*, and Justice Kagan's concurrence in *Jardines*. *See* A8-9. The appellate court was incorrect, as *Kyllo* could not have put the officers on notice that their conduct was unlawful (if, in fact, it was), and the officers cannot be faulted for failing to follow an approach that was not adopted by the majority in *Jardines*.

Kyllo held that the use of a thermal-imaging device that could detect lawful, intimate activity in the home violated a homeowner's reasonable expectation of privacy. 533 U.S. at 40. The appellate majority here maintained that the officers should have known that a dog sniff had a similar effect. But that argument was rejected in *Caballes*, which holds that a dog sniff is not a Fourth Amendment search. 543 U.S. at 409-10. The appellate court thus wrongly found the police officers culpable for following Supreme Court precedent.

Justice Kagan's *Jardines* concurrence did liken dog sniffs to *Kyllo*'s thermal-imaging device. 569 U.S. at 14-15. But the *Jardines* majority, which applied a property-based approach, explicitly declined to decide whether the dog sniff violated that defendant's reasonable expectations of privacy. 569 U.S at 11. Indeed, the majority suggested that the outcome may have been different under the privacy framework. *See id.* (recognizing that dogs, unlike thermal-imaging devices, have been in use for centuries, which fact was relevant to the privacy analysis). Thus, the appellate court here improperly faulted the officers for failing to follow a concurrence not adopted by a majority of justices in *Jardines*.

And while the appellate court was correct that *Stoner v. California,* 376 U.S. 483 (1964), held that officers may not conduct a warrantless search of a hotel room based on the consent of a hotel employee, *see* A13, this Court

explained in *Eichelberger*, 91 Ill.2d at 366, that legitimate expectations of privacy do not extend to the area immediately outside the room.

Finally, the appellate court thought that the officers should have known that a dog sniff would violate reasonable privacy expectations under *Burns*, 2015 IL App (4th) 140006, which held that a dog sniff in a locked apartment building common area was a search pursuant to *Jardines*'s property-based approach. But *Burns* explicitly did "not consider whether defendant had a reasonable expectation of privacy in the common area of the apartment building." *Id.* ¶ 49. And *Burns* — like *Kyllo* and *Jardines* — did not involve hotel or motel hallways, which this Court has instructed are different than the areas surrounding private residences. For this reason, the appellate court also was mistaken in relying on the discussions of the good-faith exception in *Bonilla*, 2018 IL 122484, and *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016), cited A12-13, as those cases involved apartment buildings.

In sum, the officers here were in an area that this Court has instructed enjoy reduced expectations of privacy, conducting activity that the United States Supreme Court and this Court have repeatedly affirmed is not a Fourth Amendment search and is authorized by numerous state and federal courts. Under these circumstances, the good-faith exception applies and exclusion of the drug evidence is inappropriate.

CONCLUSION

This Court should reverse the judgment of the appellate court.

May 16, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-two pages.

/s/ Eldad Z. Malamuth
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STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 16, 2019, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Eldad Z. Malamuth
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2018 IL App (3d) 150877

Opinion filed October 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois.
	)	
v.	)	Appeal No. 3-15-0877
	)	Circuit No. 15-CF-290
JONATHAN LINDSEY,	)	
	)	The Honorable
Defendant-Appellant.	)	Michael F. Meersman,
	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court, with opinion.
Justice O'Brien concurred in the judgment and opinion.
Justice Schmidt concurred in part and dissented in part, with opinion.

OPINION

¶ 1 In April 2014, the police used a trained drug-detection dog to conduct a free air sniff of the door handle and seams of defendant Jonathan Lindsey's motel room. The dog alerted to the presence of drugs inside the room, and the police obtained a search warrant. During their search, they found 4.7 grams of heroin, and Lindsey was charged with unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school. Lindsey filed a motion to suppress evidence, arguing that the dog sniff violated his fourth amendment rights. The trial court denied the motion. Ultimately, the court found Lindsey guilty and entered a judgment of

conviction and a separate second judgment ordering Lindsey to pay a $3000 drug assessment fee, a $500 drug street value fine, and a $250 DNA analysis fee and to submit a DNA sample. Lindsey appealed, arguing that (1) the trial court erred when it denied his motion to suppress evidence and (2) this court should vacate his fees and fine. We reverse and remand.

¶ 2 FACTS

¶ 3 On April 27, 2014, Lindsey was arrested for driving while his license was suspended. While Lindsey was in custody, he told police he was staying in a motel room at American Motor Inn. He did not give the officers consent to search the room. Rock Island County sheriff deputy Jason Pena arrived at the American Motor Inn with a drug-detection dog and performed a free air sniff on the exterior of Lindsey's motel room door. The dog alerted to the presence of drugs in the room. Rock Island Police Department Detective Timothy Muehler obtained a search warrant and found 4.7 grams of a powdery substance later determined to be heroin. After the search, Lindsey admitted that he possessed the heroin. Lindsey was charged with one count of unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school (Class X felony).

¶ 4 In July 2015, Lindsey filed a motion to suppress evidence. In the motion, he argued that the dog sniff violated his fourth amendment rights because it constituted an unreasonable search of the corridor of his motel room. He, therefore, claimed that any evidence seized and any statements made to the officers subsequent to the search should be suppressed.

¶ 5 A hearing on the motion was held in September 2015. Rock Island Police Department Sergeant Shawn Slavish testified that a dog sniff was conducted on the door of room 130 at the American Motor Inn. He explained that "the door itself set back in a little alcove and as you stepped into the alcove to the right was Room 130 and I believe across the hall to that would be

Room 131." The door to the alcove was propped open and the area was open to the public. Pena informed Slavish that the dog had alerted the presence of drugs at the door. Afterward, the officers obtained a search warrant and searched the room.

¶ 6 Officer Pena testified that, on April 27, the Rock Island Police Department requested him to conduct a free air sniff of motel room 130. During the dog sniff, Pena explained,

> "I let him off lead and basically had him go to that side of the building actually checking for free air sniffs alongside that building. Once you reach Room 130, he changed his behavior, alerting to the odor of narcotics. In this particular instance what he did is he came up around the door handle and its seams and he—an alert would be that he would actually sit and lay down, which he did, indicating that he is in the odor of narcotics."

The dog was "within inches" of the door when he sniffed the handle and seams. The dog also searched the general area around the room but did not alert the officer about the presence of drugs until he reached room 130.

¶ 7 Kylinn Ellis testified that Lindsey was her son's father. On April 27, Ellis was in the passenger seat of her car while Lindsey was driving. The police pulled the car over, arrested Lindsey for driving without a license, and took possession of the car. Afterward, Ellis walked to American Motor Inn to charge her phone in Lindsey's motel room. When she arrived, she saw a black Suburban with tinted windows in front of the motel. She also believed someone was in the motel room because "the curtains were moving, and you can see like somebody in there" but she did not actually see a person in the room. She did not know if anyone besides Lindsey had stayed

in the motel room but she had seen clothes that were not Lindsey's in the room. As she walked up to the motel room, she was stopped by a detective who told her she could not enter the room.

¶ 8 The trial court did not find Ellis's testimony that she believed someone was in the motel room after Lindsey was arrested credible because she had testified that she did not see a person in the room and there could have been other causes, such as an air conditioning or heating unit, for the movement of the curtains. It also stated that the police had a right to bar Ellis from the motel room to secure the scene. Relying on the Eighth Circuit's decision in *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997), the court determined that Lindsey did not have a reasonable expectation of privacy in the corridor of his motel room because, unlike an apartment or house, the corridor of a motel room "was a public place of accommodation, and it was a public access area." The trial judge explained that there were no Illinois cases that addressed this issue, and although he agreed with some of the points discussed in the *Roby* dissent, he was not going to create new case law. Ultimately, the court denied the motion to suppress.

¶ 9 In October 2015, a stipulated bench trial was held. The court found Lindsey guilty and sentenced him to seven years' imprisonment and three years of mandatory supervised release. At sentencing, the court commented on his fines and fees, stating "I note that there's still monies owing there. The clerk is to take all the monies that is showing [*sic*] owing in these cases and reduce everything to judgment, including the costs here, because obviously, he doesn't have the ability to pay any of them and it's just silly to keep these files open just for money issues in relation to that."

¶ 10 In November 2015, the court entered two separate judgments. The first judgment did not list any fines or fees. The second judgment ordered Lindsey to pay a $3000 drug assessment and a $500 drug street value fine. It also ordered him to submit a specimen of his blood, saliva, or

other tissue and pay a $250 DNA analysis fee. The Illinois State Police DNA indexing lab system shows that Lindsey had submitted a swab sample on October 16, 2012. Lindsey appealed both his conviction and the imposition of fines and fees.

¶ 11 ANALYSIS

¶ 12 I. Fourth Amendment

¶ 13 A. Reasonable Expectation of Privacy

¶ 14 Lindsey argues that the trial court's denial of his motion to suppress evidence was error because the police officer's use of a drug-detection dog near his motel room door constituted a warrantless search and, therefore, violated his fourth amendment rights. He claims that case law established that a guest in a motel room is constitutionally protected under the fourth amendment and that this rule also applies to his motel door, which is a part of the structure of the motel room. He also alleges that, pursuant to *Kyllo v. United States*, 533 U.S. 27 (2001), the dog sniff violated his fourth amendment rights because a drug-detection dog was used to explore details of the motel room not previously discernible without physical intrusion.

¶ 15 To begin, Lindsey references *Stoner v. California*, 376 U.S. 483 (1964), and *People v. Eichelberger*, 91 Ill. 2d 359 (1982), to support his argument that a guest in a motel room is entitled to constitutional protections under the fourth amendment. In *Stoner*, the United States Supreme Court established that "[n]o less than a tenant of a house, or the occupant of a room in a boarding house, [citation], a guest in a hotel room is entitled to constitutional protections against unreasonable searches and seizures." *Stoner*, 376 U.S. at 490.

¶ 16 Our supreme court in *Eichelberger* concluded that a hotel occupant's reasonable expectation of privacy is *reduced* with regard to the area immediately adjoining the room and cites *United States v. Burns*, 624 F.2d 95 (10th Cir. 1980), and *United States v. Agapito*, 620

F.2d 324 (2nd Cir. 1980), to support its reasoning. In *Burns*, the Tenth Circuit stated that, in the context of conversation,

> "[m]otel occupants possess the justifiable expectation that if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear, that it will go unintercepted. Contrarily, to the extent they converse in a fashion insensitive to the public, or semipublic, nature of walkways adjoining such rooms, reasonable expectations of privacy are correspondingly lessened." *Burns*, 624 F.2d at 100.

¶ 17 In *Agapito*, the Second Circuit stated that a person has a different expectation of privacy in the corridor of a hotel room than in the curtilage of a private residence. The court explained:

> " '[D]espite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence: "A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of

> public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home." ' " *Agapito*, 620 F.2d at 331 (quoting *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979), quoting *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir. 1964)).

¶ 18 Lindsey also cites multiple cases with varying fact patterns to support the proposition that the use of a drug-sniffing dog in the common area of a motel constitutes a fourth amendment search. In *Florida v. Jardines*, 569 U.S. 1, 3-4 (2013), the police conducted a dog sniff on the front porch of Jardines's private home. When the dog sniffed the front door, he gave a positive response for drugs, and the police obtained a search warrant. *Id.* at 4. The officers found marijuana during the search, and Jardines was charged with trafficking. *Id.* Our Supreme Court stated that the curtilage, or area immediately surrounding and associated with the home, was the "constitutionally protected extension" of the home and determined that Jardines's front porch was considered curtilage. *Id.* at 6-8. It also found that, although a visitor would have an implied license to approach the home for a brief moment, a resident does not give a police officer a "customary invitation" to use a trained police dog to investigate the area to find incriminating evidence. *Id.* at 8-9. The court declined to discuss whether the dog sniff violated Jardines's reasonable expectation of privacy. *Id.* at 11 ("The *Katz* [*v. United States*, 389 U.S. 347 (1967)] reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." (Emphases in original and internal quotation marks omitted.)).

¶ 19 Justice Kagan concurred, stating that if the case had reviewed Jardines's reasonable expectation of privacy, the Court's decision in *Kyllo*, would provide guidance. *Id.* at 14 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). In *Kyllo*, wherein the Court held that the police officers' use of a thermal-imaging device to detect heat from a private home constituted a search, the Court established that " 'Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.' " *Id.* at 14 (quoting *Kyllo*, 533 U.S. 27 at 40). Justice Kagan opined that the police officers conducted a search because the officers used a trained drug-detection dog, or a "device that is not in general public use," to explore details of Jardines's home they would not have otherwise discovered without entering the home. *Id.* at 14-15.

¶ 20 In *United States v. Whitaker*, 820 F.3d 849, 850 (7th Cir. 2016), police officers obtained permission from an apartment manager to conduct a dog sniff in a locked, shared hallway of an apartment building. The dog alerted the presence of drugs at Whitaker's apartment. *Id.* The officers obtained a search warrant, found incriminating evidence, and charged Whitaker with various drug and firearm offenses. *Id.* On appeal, Whitaker argued that the use of a drug-detection dog violated his privacy interests under *Kyllo*. *Id.* at 852. The Seventh Circuit determined that, under the *Kyllo* rule, a "trained drug-sniffing dog is a sophisticated sensing device not available to the general public." *Id.* at 853. "The dog here detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment." *Id.* The court noted that Whitaker did not have "complete" reasonable expectation of privacy in his apartment hallway. *Id.* However, "Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy

against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Id.* The court also stated:

> "Whitaker's lack of a right to exclude did not mean he had no right to expect certain norms of behavior in his apartment hallway. Yes, other residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door. Similarly, the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside. Applied to this case, this means that because other residents might bring their dog though the hallway does not mean the police can park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant." *Id.* at 853-54 (citing *Jardines*, 569 U.S. at 9).

The court concluded that the facts presented constituted a search under the fourth amendment and that Whitaker's rights were violated when the officers conducted a warrantless search in the hallway of his apartment. *Id.* at 854.

¶ 21 In a similar analysis, our supreme court in *People v. Burns*, 2016 IL 118973, found that the police officers' warrantless use of a sniff dog at the defendant's apartment door in a locked apartment building violated the defendant's fourth amendment right because the locked apartment building was a constitutionally protected area pursuant to *Jardines*. In *People v. Bonilla*, 2017 IL App (3d) 160457, *pet. for leave to appeal allowed*, No. 122484 (Sept. 27,

2017), this court determined that the police officer's actions constituted a search under the fourth amendment when he entered the common area hallway of an unlocked apartment building and conducted a dog sniff of the defendant's front door. The court reached that conclusion because the common area hallway constituted curtilage under *Jardines* and *Burns*. However, both courts declined to apply the privacy-based approach because the government in both cases intruded onto constitutionally protected areas.

¶ 22 The State argues that case law establishes that a guest in a motel room is entitled to a reduced expectation of privacy. Furthermore, it claims that this court should adopt the ruling in *Roby*, 122 F.3d 1120 , as the trial court did in its decision. In *Roby*, police officers conducted a dog sniff on the floor of Roby's hotel room. *Id.* at 1122. The officers walked the dog down the hall two or three times, and the dog alerted to Roby's room. *Id.* The officers obtained a search warrant and found cocaine, and Roby was charged with possessing cocaine with intent to distribute. *Id.* at 1123. On appeal, Roby challenged the denial of his motion to suppress evidence obtained during the search of his hotel room because, *inter alia*, the dog sniff violated his fourth amendment rights. *Id.* The Eighth Circuit held that a trained dog's detection of odor in a common corridor did not violate the fourth amendment. *Id.* at 1125. It reasoned that Roby's expectation of privacy was limited in a hotel corridor because people can access the area and "[n]either those who stroll the corridor nor a sniff dog needs a warrant for such a trip." *Id.* It further noted that the fact that the dog was more skilled than a human at detecting odor does not make the dog sniff illegal. *Id.* at 1124-25. Furthermore, it stated that evidence of plain smell—similar to evidence in plain view—may be detected without a warrant. *Id.* at 1125.

¶ 23 We find that the reasoning in *Whitaker* and *Jardines* is more persuasive. Similar to a sense-enhancing technology, a trained drug-detection dog is a sophisticated sensing device not

available to the general public. See *Jardines*, 569 U.S. at 14-15 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.); *Whitaker*, 820 F.3d at 853. In this case, the drug-detection dog was used to explore the details previously unknown in Lindsey's motel room, which the Supreme Court established was entitled to constitutional protections. See *Stoner*, 376 U.S. at 490.

¶ 24 The State argues that Lindsey's reasonable expectation of privacy is reduced with regard to the area immediately adjoining the motel room. In *Whitaker*, the court recognized that the defendant did not have a complete expectation of privacy in his apartment hallway; however, this did not mean he had "no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Whitaker*, 820 F.3d at 853. Furthermore, in *Burns*, 624 F.2d at 100—the case our supreme court in *Eichelberger* relies on—the court stated that a motel guest has a *justifiable* expectation that "if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear, that it would go unintercepted." Lindsey had a justifiable expectation of privacy because, until Pena focused the free air sniff on the motel door and seams to detect the odor of drugs inside Lindsey's motel room, the smell was undetectable outside of the room. Therefore, we reject the State's argument and find that the dog sniff constituted a warrantless search in violation of Lindsey's fourth amendment rights.

¶ 25 B. Exclusionary Rule

¶ 26 Next, we address whether Pena's violation meets the good faith exception to the exclusionary rule. The State contends that it has met the good faith exception because the officer had no reason to believe that he was violating Lindsey's fourth amendment rights. Although the State acknowledges that the police could not rely on any binding precedent to *authorize* the dog

sniff or the search warrant, it argues, however, there is no precedent *prohibiting* the officers' actions in a hotel hallway and, if anything, the officers would have relied on *Roby* and similar cases as guidance.

¶ 27 Generally, courts will not admit evidence obtained in violation of the fourth amendment. *Burns*, 2016 IL 118973, ¶ 47. "The fruit-of-the-poisonous-tree doctrine is an outgrowth of the exclusionary rule providing that the fourth amendment violation is deemed the poisonous tree, and any evidence obtained by exploiting that violation is subject to suppression as the fruit of that poisonous tree." (Internal quotation marks omitted.) *Id.* The main purpose of the exclusionary rule is to deter future unlawful police conduct and fulfill the guarantee of the fourth amendment against unreasonable searches and seizures. *Id.*

¶ 28 The exclusionary rule is applied only in unusual cases when its application will deter future fourth amendment violations. *Id.* ¶ 49 (citing *People v. LeFlore*, 2015 IL 116799, ¶ 22). Exclusion of evidence is a court's last resort, not its first impulse. *Id.* In considering the good faith exception to the exclusionary rule applies in any case, the inquiry is "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." (Internal quotation marks omitted.) *Id.* ¶ 52 (quoting *LeFlore*, 2015 IL 116799, ¶ 25). "The Supreme Court expanded the good-faith exception to the exclusionary rule to include good-faith reliance upon binding appellate precedent that specifically authorized a particular practice but was subsequently overruled." *Id.* ¶ 49 (citing *Davis v. United States*, 564 U.S. 229, 241 (2011)).

¶ 29 Illinois courts have addressed the good faith exception in the context of binding authority. *Bonilla*, 2017 IL App (3d) 160457, ¶ 24 (finding that, similar to *Burns* and *Whitaker*, United States Supreme Court and Illinois Appellate Court already ruled that a dog sniff of the front door

of a residence was a fourth amendment search, and therefore, police could not rely on the good faith exception); *Burns*, 2016 IL 118973, ¶ 68 (holding that the good faith exception does not apply because there was no binding precedent authorizing officers' conduct except for a Fourth District case prohibiting the conduct); See also *Whitaker*, 820 F.3d at 854-55 (ruling that "no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant," and therefore, good faith exception did not apply).

¶ 30 Here, the parties concede, and we agree, that there was no binding appellate precedent in effect at the time but subsequently overruled that Pena could have relied on to justify the dog sniff. In fact, there *was* sufficient binding precedent for him, as a reasonably well-trained officer, to know the dog sniff required a warrant. The dog sniff in this case occurred on April 27, 2015. At least four, and arguably five, cases decided prior to this dog sniff establish the proposition sufficiently that a reasonably well-trained officer should have known that conducting a warrantless air sniff to detect contents *inside* a hotel room violates the fourth amendment.

¶ 31 Fifty-one years prior to the search in this case, the United States Supreme Court decided, in *Stoner*, 376 U.S. at 490, that guests in hotel rooms, tenants in apartments, and residents in homes all have the same expectation of privacy in their personal space and are all entitled to the same constitutional protections against unreasonable search and seizure under the fourth amendment.

¶ 32 Thirty-three years prior to this search, the Illinois Supreme Court decided *Eichelberger*, 91 Ill. 2d 359, recognizing a hotel occupant's reasonable expectation of privacy in the hotel room—as had *Stoner*—but explicitly finding that expectation reduced with regard to the common area adjoining the room. In reaching that conclusion, our supreme court expressly relied

on two federal appeals court decisions, *Burns*, 624 F.2d at 100 ("Motel occupants possess the justifiable expectation that *if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear*, that it would go unintercepted." (Emphasis added.)), and *Agapito*, 620 F.2d at 331 ("*Granted that a tenant has standing to protect the room he occupies*, there is nevertheless an element of public or shared property in *motel surroundings* that is entirely lacking in the enjoyment of one's home." (Emphases added and internal quotation marks omitted.))

¶ 33 Fourteen years prior to Pena's search, in *Kyllo*, the Supreme Court, in a case involving the use of thermal imaging to detect activity inside a home, decided that the use of a sense-enhancing technology not available to the general public to obtain information about activities inside a home that are not visible to the naked eye and that could not be obtained without physical intrusion into the home is a search entitled to fourth amendment protection.

¶ 34 Two years prior to the Pena search, the United States Supreme Court decided in *Jardines*, 569 U.S. at 9-11, that the use of a trained drug-detection dog to sniff the area outside the defendant's private home was a fourth amendment search entitled to fourth amendment protections. The *Jardines* majority decided the case on property grounds. However, as three concurring judges noted, a trained drug-detection dog is also a sense-enhancing detection tool and its use to detect details of and activities inside a protected space that would not have been discovered without entering the home violated the defendant's reasonable expectation of privacy and would similarly constitute a fourth amendment search under a privacy analysis. *Jardines*, 569 U.S. at 14-15 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). Privacy is the basis of Lindsey's argument in this case.

¶ 35 Finally, in *People v. Burns*, 2015 IL App (4th) 140006, the appellate court opinion, issued shortly before Pena's search, found that a dog sniff of the frame around an apartment door—the same type of sniff as that in this case—was a search under the fourth amendment entitled to constitutional protection.

¶ 36 In sum, these decisions had clearly established at the time of Pena's dog's sniff of the door to Lindsey's motel room that the sniff violated his reasonable expectation of privacy in his motel room and could not have been undertaken without a warrant. The fact that subsequent decisions of the Illinois Supreme Court and our appellate courts have restated this fact with additional specificity and clarity does not undermine the fact that the earlier cases were quite sufficient to have apprised a reasonably well-trained officer that the execution of the Pena dog sniff without a warrant violated the fourth amendment. The evidence seized as a result of the sniff should have been suppressed on this basis.

¶ 37 Second, the evidence shows that the dog sniff was not merely "simple, isolated negligence," as argued by the State, but was a deliberately executed attempt to find drugs inside Lindsey's motel room. See *LeFlore*, 2015 IL 116799, ¶ 24 ("[w]here the particular circumstances of a case show that police acted with an objectively reasonable good-faith belief that their conduct was lawful, or when their conduct involved only simple, isolated negligence, there is no illicit conduct to deter" (internal quotation marks omitted)). The police were suspicious of Lindsey's activities because a confidential informant stated that Lindsey was selling drugs in the motel and that Lindsey had a criminal history. Subsequently, the police conducted a surveillance of Lindsey's motel. After Lindsey was arrested, the police spoke with motel staff to inquire about Lindsey's motel room. Pena and his K-9 arrived at the motel and conducted an air sniff of the door handle and seam of Lindsey's motel room to detect narcotics. Under these

circumstances, Pena's conduct, as required by *LeFlore*, was "sufficiently deliberate that deterrence is effective and sufficiently culpable that deterrence outweighs the cost of suppression." (Internal quotation marks omitted.) *Id.* We, therefore, hold that suppression of the evidence was necessary. The denial of defendant's motion to suppress is reversed, the evidence is suppressed, his conviction is vacated, and the matter is remanded for further proceedings consistent with this decision.

¶ 38 II. Court Fines

¶ 39 Because Lindsey's conviction has been vacated and this case is being remanded, the fines and fees issues raised by the defendant are moot. However, in the event that a petition for leave to appeal is filed and granted, we briefly address those issues. Lindsey argues that the trial court erred when it assessed a $3000 drug assessment and $500 street value fine in its written judgment because the court stated that it would not impose any fines at sentencing. He asks this court to vacate the drug assessment and street value fine. The State concedes that both fees should be vacated.

¶ 40 "When the oral pronouncement of the court and the written order conflict, the oral pronouncement of the court controls." *People v. Roberson*, 401 Ill. App. 3d 758, 774 (2010). Illinois Supreme Court Rule 615(b) allows a court to modify a written judgment to bring it into conformity with the oral pronouncement of the trial court. *People v D'Angelo*, 223 Ill. App. 3d 754, 784 (1992). Questions regarding the appropriateness of fines, fees, and costs imposed by a sentencing court are reviewed *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 41 At sentencing, the trial court instructed the clerk to remove Lindsey's fines. However, the second judgment showed that the court assessed a $3000 drug assessment and $500 street value

fine. Based on the evidence presented, we vacate the $3000 drug assessment and $500 street value fine.

¶ 42 III. DNA Analysis Fee

¶ 43 Lindsey also alleges that the trial court erred when it ordered him to submit a DNA sample and pay a $250 DNA analysis fee although he previously submitted a DNA sample and paid the fee. He asks this court to vacate the DNA analysis fee. The State concedes that this fee should be vacated.

¶ 44 Section 5-4-3(a) of the Unified Code of Corrections provides that any person convicted of felony offense must submit specimens of blood, saliva, or tissue to the Illinois Department of State Police. 730 ILCS 5/5-4-3(a) (West 2016). Section 5-4-3(j) states that if someone submits specimens of blood, saliva, or tissue, he must pay a $250 analysis fee. *Id.* § 5-4-3(j). Our supreme court has established that section 5-4-3 authorizes the $250 analysis fee only when the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Questions regarding the appropriateness of fines, fees, and costs imposed by a sentencing court are reviewed *de novo*. *Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 45 Lindsey states that he failed to preserve this issue for review. However, the State does not argue that he waived this issue and concedes to the vacatur of the analysis fee. *People v. Williams*, 193 Ill. 2d 306, 347 (2000) ("the State may waive an argument that the defendant waived an issue by failing to argue waiver in a timely manner"). Based on the Lindsey's Illinois State Police DNA form and prior convictions, it is presumed that he was previously ordered to submit a DNA sample and pay the $250 analysis fee, and therefore, the subsequent order is improper. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (determining that because a

convicted felon is required to submit a DNA sample, it is presumed that the trial court imposed the requirement on a prior conviction). Therefore, we vacate the DNA analysis fee.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Rock Island County is reversed and remanded.

¶ 48 Reversed and remanded; fines and fees vacated.

¶ 49 JUSTICE SCHMIDT, concurring in part and dissenting in part:

¶ 50 Even assuming that the majority correctly determined that the dog sniff in this case violated the fourth amendment (it did not), the good faith exception to the exclusionary rule applies.

¶ 51 Up to this point, courts have determined that canine sniffs of residential and apartment doors constitute fourth amendment searches. See *Jardines*, 569 U.S. 1; *Burns*, 2016 IL 118973; *Bonilla*, 2017 IL App (3d) 160457; *Whitaker*, 820 F.3d 849. No similar holding has been made regarding canine sniffs of hotel room doors. In fact, until now the relevant authority indicates that canine sniffs in the common corridors of hotels are not fourth amendment searches because a hotel tenant possesses a reduced expectation of privacy. See *Roby*, 122 F.3d 1120 (8th Cir. 1997); *Eichelberger*, 91 Ill. 2d 359; *Agapito*, 620 F.2d 324. Based on the facts of this case and the state of the law, no one can reasonably argue that the officers acted in bad faith. Accordingly, I would find the good faith exception to the exclusionary rule applies.

¶ 52 With respect to the fines and fees issues, I agree that we should accept the State's concession and vacate them. Otherwise, I would affirm.

They do say: "However, in contrast to the occupant of a private dwelling who has exclusive enjoyment to the land he possesses immediately surrounding his home, the hotel occupant's reasonable expectations of privacy are reduced with regard to the area immediately adjoining his room." Judge, reduced, not eliminated.

And, Judge, I would argue that even -- even in this reduced version of expectations of privacy outside of a hotel room, there's still enough there that a dog sniff, which is using an instrumentality which is not commonly available to the public, that still constitutes an impermissible intrusion, even in this reduced view, Judge.

Mr. Umlah does make a point that the legislature has said nothing specific to suggest that they want the ceiling higher. However, Judge, the cases that I have shown to the Court, taken together, I believe, show that that's the natural result from looking at the result of these cases. So, I, again affirm the contents of my motion, Your Honor, and ask that this be evidence be stricken -- or, excluded, rather.

THE COURT: Well, as far as the two issues. The first issue, I'll -- of Miss Ellis' testimony, I have

no doubt -- believe what she said. I have a question as far as the timing, though, because I don't know if you guys have a copy of the traffic ticket, but it's in this file, and it shows it was -- that the actual time of the ticket is 16:44, which would make it about quarter to five.

I think, Miss Ellis, you said it was like three to 3:30. I don't know, because, obviously -- All I know as far as the time -- because I don't know all the facts, Mr. Lindsey, because I never looked at the police reports, but if you look at the traffic ticket, it says it was written at 16:44, which, military time, is 4:44.

But, in relation to what she saw, she didn't indicate she saw anybody in the room. She saw the curtains moving, and if you look at Picture 1, right beneath the drapes and the curtains is the air conditioning and heating unit, which when they turn on, like in most rooms, is directly underneath the curtains, and if the air is pointing up, which I would believe -- most do, still do -- then, those curtains are going to be moving in relation to the movement of the air in the room. I don't know if the windows were open or not, but if the air conditioner or the fan or

the heater, whatever -- I don't know what the temperature was on that date and time, but if it's -- if that thing is on, it's -- those curtains are going to move, because they're right under -- they're right -- the unit's right underneath the curtains.

And in relation to the detective not letting her in, well, that's obvious, that, obviously, they have the right to secure the premises. Again, I don't know that she -- if she would have said somebody was actually in there, then, you're going have to have a hearing as to find out who it actually was in there, whether it was an officer or whether it was the maid. But, like Mr. Umlah said, you can't believe it would be the maid if they were trying to secure the premises. Not that she be hiding evidence, but, obviously, you don't want anybody at all in there.

And, like I said, because she didn't actually see anybody, then, you can't just presume somebody's in there, because again, that's where the air is flowing.

And in relation to the first argument, there is a new case out. There is new case in Illinois, *People versus Burns*, 25 Northeast 3d 1244, 369 Illinois Decisions 218, and it's a January case of this year.

And it's not a motel case, and it's not a

house case. Rather, it is an apartment within a building, an apartment building. And the gist of it is, is that they allowed the dog detection to go through -- up and down the halls of this place. And the appellate court said no.

And the reason is, is that -- I'll just -- I'm looking through the sub headings here -- that even though the defendant had a landing rather than a front porch outside or front door, as a home front door was part of the home, and its immediate surroundings, entrance to defendant's apartment building was locked every time police attempted to enter.

Apartment building hallway in which entrance to defendant's apartment was located was not a public thoroughfare. There was no invitation for the dog to explore the area around the home in terms of discovering anything, and there was no implicit invitation for visitors to come to the front door in the middle of the night, all because the fact that it was a locked apartment building. So, apartment buildings are protected now if they are locked.

The issue still remains as far as the motel because, as Mr. Umlah said, the only case I found was the *Roby* case, and unfortunately for you, Mr. Lewis,

basically, that still appears to be good law, that there is no reasonable expectation of privacy.

In fact, in *Roby*, just looking at it here, the -- quoting now: "Mr. Roby had an expectation of privacy in his Hampton Inn hotel room."

And you had an expectation, Mr. Lindsey, inside that motel room.

"But because of the corridor outside of that room is traversed by many people, his reasonable expectation of privacy does not extend so far. Neither those who stroll the corridor, nor a sniff dog needs a warrant for such a trip." And basically, they hold that's why they allowed the drug search, because they -- they ruled that it was a public place of accommodation, and it was a public access area.

And at this point, Illinois has not done anything to divest itself of that case law, and appears to be to still be good federal case law, and, as such, I'm not going to create new case law, even though some of the issues that were brought up by the dissent, I would agree with, Mr. Lewis. But there is a way to preserve that issue and appeal it and maybe you get some case law on it, since there doesn't seem to be any.

But at this point, *Roby* is still apparently good law, and the other cases haven't gone so far as motel rooms. They've gone to locked apartment buildings and houses, which I totally agree with, but at this point in time, the motel room corridor is a public place of accommodation, and, as such, they have the right to walk that dog down there, and, as such, the Motion to Suppress is denied.

The question becomes: Where do you want to move the case to now?

MR. LEWIS: Judge, I know that the pre-trial list for October 9th is getting a little bit busy, if I'm not mistaken.

THE COURT: It's actually not that bad. I mean, it's not as bad as some of them. Because, I -- I guess my --

Off the record a second.

(A discussion was held off the record.)

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(End of proceedings.)

IN THE CIRCUIT COURT OF ROCK ISLAND COUNTY, ILLINOIS
FOURTEENTH JUDICIAL CIRCUIT
CRIMINAL DIVISION

Date of Sentence: 11-16-2015

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

vs.

JONATHAN A. LINDSEY,
DOB: 05-24-1986 Defendant.

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY CRIMINAL DIVISION
NOV 19 2015
Clerk of the Circuit Court

NO. **15-CF-00290**
CT 1 UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE (Class - X Felony)

JUDGEMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant **Jonathan A. Lindsey**, **DOB: 05-24-1986** has been adjudged guilty of the offenses enumerated below,

IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months for each offense

CNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE	04-27-2015	720 ILCS 570/407(b)(1)	X Felony	7 YEARS	3 YEARS

THE COURT FINDS that the defendant is entitled to receive credit for time actually served in custody of Rock Island County Sheriff's Department from **4/27/15 until the arrival to the Department of Corrections.**

IT IS FURTHER ORDERED that the Clerk of the Court deliver a copy of this order to the Sheriff

IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver the defendant to the Department of Corrections which shall confine said defendant until expiration of the defendant's sentence or until the defendant is otherwise released by operation of law.

IT IS FURTHER ORDERED that the defendant's MSR shall run concurrent with MSR violation in 12CF270

This order is effective immediately.

ORDERED: 11/19/15

F. Michael Meersman

HONORABLE F. MICHAEL MEERSMAN

JJU/jc

IN THE CIRCUIT COURT OF ROCK ISLAND COUNTY, ILLINOIS
FOURTEENTH JUDICIAL CIRCUIT
CRIMINAL DIVISION

Date of Sentence: 11-16-2015

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	NO.	**15-CF-00290**
vs	)	CT 1	UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE (Class - X Felony)
JONATHAN A. LINDSEY, DOB: 05-24-1986 Defendant.	)		

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY CRIMINAL DIVISION
NOV 19 2015
Clerk of the Circuit Court

JUDGEMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant **Jonathan A. Lindsey**, **DOB: 05-24-1986** has been adjudged guilty of the offenses enumerated below,

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IT IS FURTHER ORDERED that the Clerk of the Court deliver a copy of this order to the Sheriff.

IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver the defendant to the Department of Corrections which shall confine said defendant until expiration of the defendant's sentence or until the defendant is otherwise released by operation of law.

1. That the defendant shall pay a $100.00 Laboratory Analysis fee to the Illinois State Police pursuant to 730 ILCS 5/5-9-1 4
2. That the defendant shall pay a mandatory drug assessment in the amount of $3000.00 pursuant to 720 ILCS 570.411.2.
3. That the defendant shall pay a Drug Street Value Fine in the amount of $500.00, pursuant to statute, $62.50 shall be forwarded to the Illinois Juvenile Drug Abuse Fund, $250.00 forwarded to Rock Island Police Department, and $187.50 forwarded to the County General Fund.
4. IT IS FURTHER ORDERED that specimens of the defendant's blood, saliva, or other tissue, as directed by the Illinois State Police, shall be collected within 45 days at a place and time designated by the Illinois State Police for genetic marker analysis pursuant to 730 ILCS 5/5-4-3(b). The defendant shall pay an analysis fee of $250 00.
5. IT IS FURTHER ORDERED that the defendant is ordered to pay the costs of prosecution herein. These fees, costs, and restitution (if applicable) are reduced to judgement against the defendant and are declared a lien upon the defendant's property.

IT IS FURTHER ORDERED that the defendant's MSR shall run concurrent with MSR violation in 12CF270.

This order is effective immediately.

ORDERED: 11/18/15

HONORABLE F. MICHAEL MEERSMAN

JJU/jc

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
GENERAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. 15 CF 290
	)	
JONATHAN LINDSEY,	)	
	)	
Defendant.	)	

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY CRIMINAL DIVISION
DEC 14 2015
Clerk of the Circuit Court

NOTICE OF APPEAL

An appeal is taken from the Order of Judgment and sentence as described below:

1. Court to which appeal is taken:
   Third Judicial District
   1100 Columbus Street
   Ottawa, Illinois 61350

2. Name of Appellant and address to which Notices shall be sent:
   JONATHAN LINDSEY #M31694
   Stateville Correctional Center
   16830 IL-53
   Crest Hill, Illinois 60403

3. Name and address of Appellant's attorney on appeal:
   Peter A. Carusona
   Deputy Defender
   Office of the Illinois Appellate Defender
   Third Judicial District
   1100 Columbus Street
   Ottawa, Illinois 61350
   (815) 434-5531, Ext. 202

If Appellant is indigent and has no attorney, does he/she want one appointed? YES

4. Date of Judgment or Order: Sentencing 11/16/2015

5. Offense of which convicted: Guilty: Unlawful Possession with Intent to Deliver a Controlled Substance

6. Sentence: 7 years in the Illinois Department of Corrections

7. Appellant is appealing: 1) the denial of defendant's motion to suppress evidence
   2) the conviction

LOGAN LEWIS
ASSISTANT PUBLIC DEFENDER

IMAGED
C000062

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